No. 82.

Brief of Claughton for P. E.

Filed Oct. 12, 1897.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

JOHN W. WARNER, ADM'R, ETC., *Plaintiff in Error,*

vs.

THE BALTIMORE & OHIO R.R. CO., *Defendant in Error.*

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BRIEF FOR PLAINTIFF IN ERROR.

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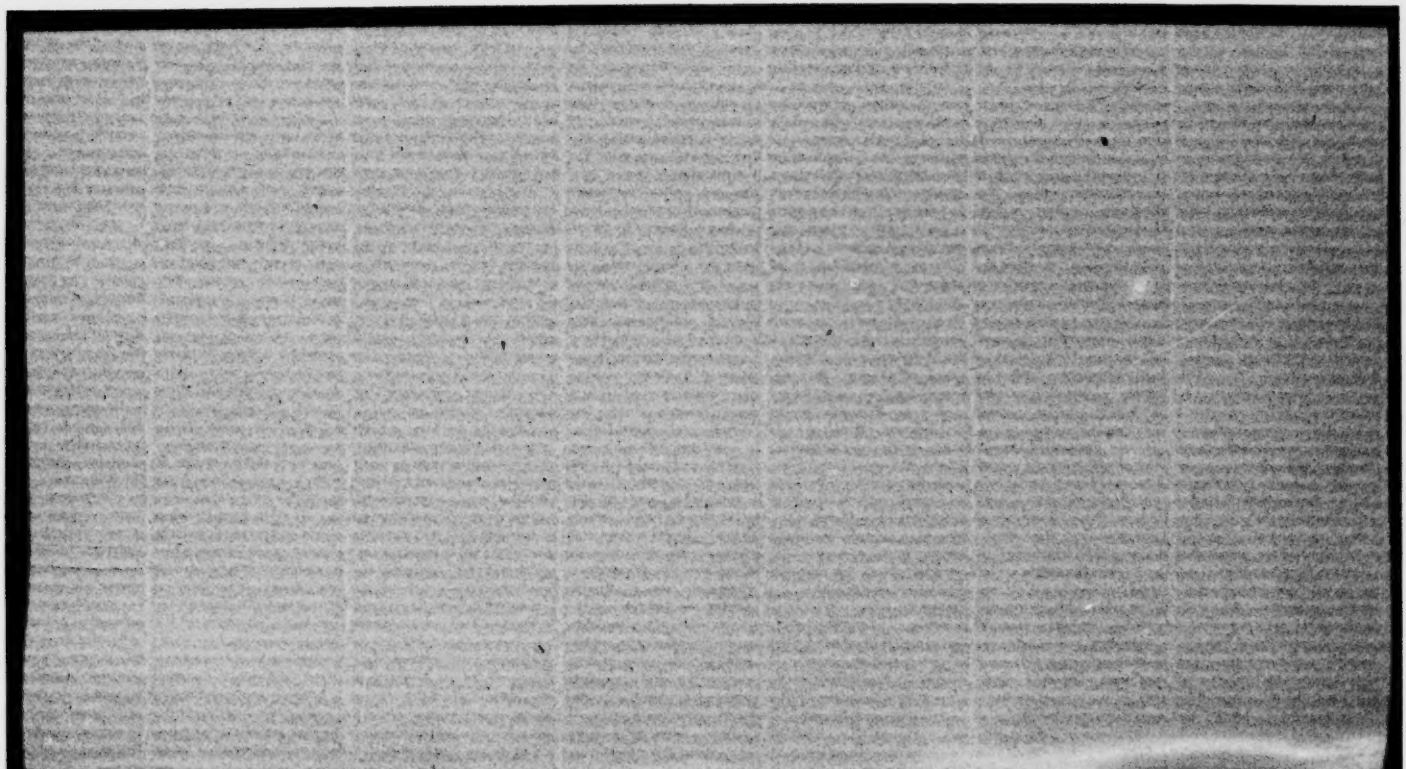

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THE BALTIMORE & OHIO RR. CO., DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the 22d day of June, 1893, plaintiff's intestate having purchased a round trip ticket issued by the defendant, from Forest Glen, Md., to University, D. C., arrived at the latter station about 7.30 a. m., and having attended to business which called him to a locality west of the western tracks at University station, returned to the depot, or ticket office, which is located at said station, and there waited until about 9 a. m., when one of the defendant's local passenger trains, bound to Forest Glen, Md., on which intestate, by virtue of said ticket, was entitled to be carried, came to and stopped at University station, for the purpose of taking on passengers; whereupon, intestate, *having in his possession the return coupon* of said round trip ticket, attempted to cross defendant's western tracks, which he was obliged to cross, in order to

get on defendant's passenger train, then and there standing on defendant's eastern tracks; and, while attempting to cross said western tracks, and while said passenger train was *then and there standing at University station*, defendant's express train, running southward, on the western tracks, at the rate of forty miles an hour—in direct violation of defendant's *rule No. 441—which prohibits any train from running past a station where is standing a passenger train*—ran past said station, striking and killing intestate, who left him surviving a widow and three children.

It was in evidence, on behalf of plaintiff, that the express which ran down intestate did not ring any bell, or blow any station whistle; and blew only the danger whistle when *about forty feet* from intestate.

It was in evidence on behalf of the defendant, that the express rang the bell, and blew the station whistle; and blew the danger whistle. That there was an unobstructed view of the tracks for the distance of about one mile from the station in the direction whence approached the express which struck intestate.

That the engineer of the express, when he was approaching University station, and when he was about 1,500 or 1,600 feet therefrom, knew the local train was then coming up to said station, which he knew was a usual stopping place for the local train at that hour; that the engineer, when he passed the whistling post, saw intestate on the platform at the depot, and that although the engineer knew of *rule No. 441*, he did not observe it, because its observance *would delay the express train.*

That when the engineer on the express observed intestate approaching the local train he endeavored to stop the express; but the high rate of speed at which it was running rendered it impossible to stop before intestate had been struck.

There was no evidence that intestate knew of his peril, or that he was warned of impending danger in time to avert the same.

ASSIGNMENT OF ERROR.

The Court of Appeals of the District of Columbia erred in affirming the judgment of the trial court in *directing a verdict for the defendant* (Rec., pp. 19, 20, 27).

ARGUMENT

As the contributory negligence which justifies the direction of a verdict depends, among other circumstances, upon the relation existing between the parties, we will consider, first, the relation which existed between plaintiff's intestate and the defendant.

I.

Plaintiff's Intestate was a Passenger of Defendant.

Plaintiff's intestate *had purchased a round trip ticket* issued by defendant from *Forest Glen to University*, and was about to make the return trip (Rec., pp. 8, 9 and 10). He was at the proper station, at the proper time (Rec., p. 10), and seeking to take passage on a train on which he was entitled to be carried by virtue of the terms of said ticket (Rec., pp. 8 and 10), and said train was then and there standing at said station for the reception of intestate (Rec., p. 8).

> "The responsibility of the carrier begins when the passenger presents himself for transportation; and this he may be said to do when he approaches the place of reception, for the purpose."
>
> Cooley on Torts, p. 770.

> "Neither the purchase of a ticket *nor the entry into the car* is essential to create the relation of carrier and passenger. The plaintiff asked to buy and pay for a ticket—and, he was entitled to the protection due to a passenger from the moment he entered upon the premises of the defendant."
>
> *Norfolk & Western RR. Co.* vs. *Galliher*, 89 Va. 643.

"Plaintiff purchased a ticket on defendant's railway; and that fact created the relation of carrier and passenger."

Wabash, St. Louis & Pac. Ry. Co. vs. *Rector*, 104 Ills. 301.

"We do not think that a passenger on a railroad train loses his character as such by alighting from the cars at a regular station, from motives of either *business* or *curiosity*, although he has not yet arrived at the terminus of his journey. It cannot properly be said, we think, if a passenger leaves a train for the purpose of obtaining refreshments, at a regular station, *or transacting business* during its stay there, but *intending to return and continue his passage*, he ceases to be a passenger, or loses the right of being protected by the regulations which the company have provided for the safety of persons *travelling on its cars*, and *using its station grounds*."

Parsons vs. *N. Y. C. & H. R. RR. Co.*, 113 N. Y. 362–3.

Atchison, T. & S. F. RR. Co. vs. *Shean*, 18 Colo. 368.

"Deceased was a passenger with a ticket that entitled him to be carried safely—it was necessary for him to cross over the intervening track of the defendant from one train to another. In making this transit, he continues to be a passenger of the defendant, and entitled to the protection that the highest degree of care on the part of the defendant could afford, under the circumstances."

Balto. & Ohio R. Co. vs. *State, use of Hauer*, 60 Md. 463.

The facts in the case abundantly prove that plaintiff's intestate was a passenger. The court below *concede* that plaintiff's intestate was *a passenger* (Rec., p. 23).

II.

Defendant was Guilty of Gross Negligence.

The following facts are proven by defendant's witness, Stephens, and are undisputed:

That when said witness, who was engineer on the express, was approaching University station, and when distant therefrom about 1,600 feet, he KNEW *the local train was coming up to the station.*

That as he passed the whistling post he SAW the *local train coming up to the station*; and SAW *intestate* on the platform at the depot *waiting to take the local train.*

That witness KNEW *said local train was then and there due at said station.*

That witness ran his train past said station at the rate of forty miles an hour.

And that witness *was aware of Rule 441*, but did not observe said rule, *because it would interfere with the schedule time of the express* (Rec., pp. 12 and 13).

The propriety of enforcing such a rule has been declared by the Supreme Court of the United States.

Chicago, etc., Ry. Co. vs. *Lowell*, 151 U. S. 217.

The engineer with full knowledge that defendant, foreseeing the peril to its passengers, had promulgated a rule for the very purpose of preventing that peril—with the further knowledge that the time and occasion for enforcing that rule were present—with the knowledge that intestate was on the platform at the depot waiting to take the train—disregarded the rule, the time, the place, the circumstance, the peril to the passenger, *in order that the express might arrive on schedule time.*

The engineer on the express had been familiar with said rule, for some time—he was also fully aware that the local train was then and there due at said station—he also, when 1,600 feet from the station and approaching thereto at the rate of forty miles an hour, saw intestate at the depot—these

circumstances were sufficient to indicate to defendant's agent not a mere possibility of the passenger's peril, but, a *probability*, if not a *certainty* thereof.

The Court of Appeals of New Jersey say:

> "If driving a train of cars at such place, and under such circumstances, does not constitute *gross negligence*, it would seem to be somewhat difficult to imagine what circumstances would render a railroad company liable for negligence *in running down a passenger about to get on board a train at a railroad station.*"
>
> *Klein* vs. *Jewett, Receiver*, 27 N. J. Eq. 552.

The court below *admit* that there was *sufficient evidence of defendant's negligence* to go *to the jury* (Rec., p. 23).

But, the learned court held, that, notwithstanding the facts *proven* by the *evidence*, and *conceded* by *the court*—namely:—

That plaintiff's intestate was a *passenger*.

That defendant was *guilty of negligence*.

A verdict for defendant was properly directed, because intestate was guilty of contributory negligence (Rec., pp. 23, 27.)

And the court below say they regard their conclusions as fully supported by the following cases (Rec., p. 25):

Elliott vs. *Chicago, Milwaukee & St. Paul RR. Co.*, 150 U. S. 245.

Not a case of a **passenger,** but the case of an *employee.*

Railroad Co. vs. *Houston*, 95 U. S. 697.

Not a case of a **passenger,** but the case of a *trespasser.*

Schofield vs. *Chicago, Milwaukee & St. Paul RR. Co.*, 114 U. S. 615.

Not a case of a **passenger,** but the case of a *traveler.*

Delaware & Lackawanna RR. Co. vs. *Converse*, 139 U. S. 469.

Not a case of a **passenger,** but the case of a *traveler.*

Aerkfetz vs. *Humphreys*, 145 U. S. 418.

Not a case of a **passenger,** but the case of an *employee.*

In the case last cited the Supreme Court say:

> "We observe that the plaintiff was an *employee*, and, therefore, the measure of duty to him was *not such* as to a *passenger*."
>
> *Aerkfetz* vs. *Humphreys, supra*, 419.

The court below seek to emphasize alleged similarity between the case at bar and the case of *Elliott* vs. *Chicago, &c., RR. Co.*, 150 U. S., *supra*, by quoting largely from the opinion of the Supreme Court in that case, as follows:

"It (the accident) took place at a station of *so little* importance that the company had *no station agent there.*"

In the case at bar, the accident occurred at *a station at which all trains* leaving Washington *stop*. There was *a ticket office* and ticket agent at said station (Rec., p. 10). There was a *gate watchman* at said station (Rec., p. 9).

"It appears that deceased, an *experienced railroad man* (*an employee* of the company), starts along and across a railroad track with which he was ENTIRELY *familiar*, with cars approaching, and before he gets across is overtaken by those cars and killed. But one explanation of his conduct is possible; and that is, that he went upon the track *without looking* to see whether any train was coming. Such omission has been again and again, both as to *travelers* on the highway and *employees* on the road, affirmed to be negligence."

In the case at bar, there was *no evidence* that intestate was familiar with the road. Intestate was *neither a traveler* on the highway nor an *employee*. Intestate was a *passenger, with a ticket*, at the *proper station*, at the *proper time*. The train on which he was entitled to be carried was standing at the station (Rec., pp. 8 and 10).

It would be useless, if not improper, to consume time in discussing the vast difference in the duty imposed by law

upon the carrier in reference to a PASSENGER, as distinguished from the lesser duty owed to employee and traveler.

But, it may be observed, that the learned Court of Appeals, in its research, overlooked a case of an *employee* wherein *the negligence* of *the defendant was conceded* (*as in the case at bar*) and, the trial court directed a verdict for the defendant, on the ground of contributory negligence on the part of plaintiff.

This judgment *was reversed* by the Supreme Court of the United States, and that court, in their opinion, say:

> "There is some testimony to show that the plaintiff ran *carelessly* through the depot; that *he knew* the train was approaching, and that *he might have guarded himself against it*, if he had stopped at the exit of the depot long enough *to have looked about him.*
>
> "But, we think *these are questions for the jury* to determine. We see no reason, *so long as the jury system is the law of the land*, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."
>
> *Jones* vs. *East Tenn., &c., RR. Co.*, 128 U. S 443.

We maintain that there is nothing in evidence, in the case at bar, to indicate *any* negligence on the part of plaintiff's intestate; but, were the contrary the case—surely, if a jury must pass upon the rights of one apparently negligent, to whom the carrier owes *small* duty—*a multo fortiori*, must that tribunal decide in cases where are in dispute the rights of those to whom the carrier owes the *utmost degree* of care, skill, and diligence.

The Court of Appeals of the District of Columbia, in affirming the judgment of the trial court in directing a verdict, held that "the presence of a railroad track is itself notice of danger" (Rec., p. 24). We are glad to say, we do not recall any case, except the case at bar, in which the above doctrine has been invoked against a *passenger* attempt

ing to board a train standing at the station, for his reception.

The learned court below deplore the alleged meagreness of the evidence in behalf of the plaintiff—as well as the fact that one of plaintiff's witnesses, an eye-witness of the occurrence, was unable to *explain the circumstances that induced* intestate to cross the tracks (Rec., p. 22). As already observed plaintiff's witness, Weeks, who was a passenger on the local train, was an eye-witness of intestate's death—but, it is respectfully submitted that the lack of clairvoyant power of this witness in no wise weakens or impairs the cause of plaintiff. The witness White, who was defendant's gatekeeper testified, that intestate *arrived* at the station, at 7.2[illegible] A. M.—and this witness again saw intestate at the station, at 8.30 A. M. (Rec., p. 9).

The witness Burke testified that intestate, who was a carpenter, had called on witness, at West Brookland, and witness had promised intestate employment at an early ensuing date (Rec., p. 11).

Thus, we observe intestate arriving at the station; transacting his business with the witness Burke—and then, returning to the station, where, as already noted, the gatekeeper saw him about 8.30 a. m.

The court below refer to the fact that intestate had been seen standing "for some time" on the platform (Rec., p. 21).

The record indicates that intestate waited at the depot about thirty minutes; and, the reason for his so waiting was the fact that the first train on which intestate was entitled to be carried left the station at, or about, 9.09 a. m. (Rec., pp. 10, 13).

III.

Plaintiff's Intestate was a Passenger of the Defendant, and was not Guilty of Contributory Negligence.

It was necessary for intestate to cross defendant's tracks in order to get aboard the train on which his ticket entitled him to be

carried (Rec., p. 10). Said train was standing at the station.

Plaintiff's witness, Weeks, testifies that, when intestate *started to approach* the local train it was at *a stand-still* (Rec., p. 8) This witness further testifies that intestate walked on the board crossing provided by defendant at the station, until he was nearly across the tracks, when he deflected slightly, in order to make a direct line for his car (Rec., p. 9). When intestate had nearly crossed said tracks, defendant's express train ran past said standing train, at the rate of forty to forty-five miles an hour, striking and killing intestate (Rec., pp. 8 and 9). Said express train did not ring any bell (Rec., p. 8), and did not blow the station whistle (Rec., p. 8), and *did not give any intimation of its approach except by blowing the danger whistle* when express was about forty or fifty feet from intestate, and while he was crossing defendant's tracks (Rec., pp. 8 and 9).

Plaintiff's witness Hollige testifies that he was made aware of the approach of the express by its danger whistle, and that he *immediately* looked up, and at that moment, the *rear car* of express train was all he saw, and the rear car was about 200 feet from the station (Rec. p. 11).

The defendant's witness Stephens (engineer on express), testifies that the aggregate length of the express train was about 240 feet (Rec., p. 13).

The testimony of witness Hollige corroborates that of plaintiff's witness Weeks (Rec., p. 8), that the only signal given by the express was the danger whistle;—and, further tends to prove that the engine of express was past the station before the signal was given.

The court below *concede* that, when intestate attempted to board the local train, it "either *had stopped*, or was about to stop at the station" (Rec., p. 21).

Attention is directed to a line of precedents, similar to the case at bar, in which learned courts have, with marked unanimity, declared the law governing this case.

Intestate, who was a Passenger, was not Obliged to Look and Listen for Approaching Trains.

The courts of last resort in the States of Massachusetts, Pennsylvania, New York, Maryland, New Jersey and Colorado have held, that a passenger at a railroad depot, when crossing intervening tracks to take passage on a train standing at the depot is not obliged to look for danger from trains approaching on the intervening tracks; and, that under such circumstances, *the question of due care on the part of the passenger must be left to the jury.*

> "There was no evidence that the plaintiff looked up the track for the purpose of seeing if a train was approaching; it appeared that he was there for the purpose of taking the cars; that the passenger train which he was about to take stood upon the opposite track discharging and receiving passengers—whether the plaintiff in crossing was in the exercise of due care was a question *within the province of the jury.*"
>
> *Wheelock* vs. *Boston & Albany RR. Co.*, 105 Mass. 208.

The Supreme Court of Pennsylvania, discussing the rule requiring *persons other than passengers* to look and listen before crossing a railroad track, say:

> "But this rule is *not* applicable *to passengers* leaving a train and crossing the track to reach the depot at the point of destination. There are duties which spring from the relations existing between the carrier and its passengers. It is the duty of the company to provide for the safe *receiving* and *discharging* of passengers."

In that case, and in the case at bar, the rule of the railroad company, in reference to the movement of its trains, was substantially the same, and the court say:

> "*Whether he* (intestate) *knew of the existence of the company's rule or not*, he might reasonably assume

under the circumstances that he could safely cross the track *without fear of a train passing while his train was there.*"

Pennsylvania R. Co. vs. *White*, 88 Pa. St. 333, 334.

The Court of Appeals of New York, in a case where a passenger, who, *before the train on* which she was to take passage, *had stopped at the station*, was injured by another train while she was crossing the tracks to get aboard, say:

"Had the plaintiff looked, she would no doubt have seen the train and avoided the accident. The rule is well settled that a *traveler* crossing a railroad track *on a public highway* is bound to use his eyes and ears to ascertain whether a train is approaching; but this rule has *not been held to apply to passengers who are crossing a track at a station to get on a train.*"

Terry vs. *Jewett, Receiver*, 78 N. Y. 343–4.

"*A passenger, when taking or leaving a railroad car at a station, has the right to assume that the company will not expose him to unnecessary danger*; and, while he must exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them with a safe passage *to* and *from* the train."

Brassell vs. *N. Y. C. & H. R. RR. Co.*, 84 N. Y. 246.

The Court of Appeals of Maryland, in a case very similar to the case at bar, say:

"In crossing over the intervening track from one platform to the other, in order to take the east bound train, the deceased might well assume that the defendant would not expose him to any danger which, by the exercise of due care, could be avoided.

"The general rule that applies in ordinary cases of parties crossing railroad tracks, that they should stop, look and listen, before making the venture, does not apply in a case like the present."

> "In such case as this, the rule is, as established by a number of well considered cases, that *the passenger* of the railroad is justified in assuming that the company has, in the exercise of this care, so regulated its trains that the road will be free from interruption or obstruction when passenger trains stop at a depot or station to receive and deliver passengers;"

and the court, referring to the passenger, say:

> "He was, unless he saw or knew of the approaching train, justified in acting upon the implied assurance that no train would be allowed to pass the station to obstruct the transfer of passengers from one train to another."
>
> *Balto & Ohio RR. Co.* vs. *State, use of Hauer*, 60 Md. 463–5.

And the same court, in its decision in a more recent case involving similar points, adopt the foregoing opinion, and for the purpose of emphasizing the point already so aptly stated, as the test of the care required of the passenger, *italicise* the words "*Saw* or *Knew*" occurring in said opinion.

> *Phil., Wilm. & Balto. RR. Co.* vs. *Anderson*, 72 Md. 529, 530.

In a case in which it appeared that a *passenger* who was obliged to cross an intervening track, in going from the depot to the train he was about to take, did not, before approaching the train, look up or down the track to see whether there was danger, but *approached the train diagonally* from the platform of the station, and *before his train had come to a full stop*, the Court of Appeals of New Jersey say:

> "He was not bound to take the very shortest route from the platform of the station to that of the nearest, or any other car of the train on which he desired to take passage—nor, was he bound *to look to see whether another train was approaching; or to wait* before crossing the easterly track *until the passenger train had come to a full stop;* because he was fully warranted,

> under the circumstances, in believing that *no train would, at that time, pass over the track which he was obliged to cross,* in *order to take one of the regular passenger trains of the road;* and, it might not be going too far to say, that *if he had looked* and *had observed* an *approaching train,* on *the easterly track,* he would have been *fully warranted in proceeding on his way across the track to the passenger train,* upon the reasonable supposition *that the approaching train would stop before it reached a point opposite the passenger station.*"
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> *Jewett, Receiver, &c.,* vs. *Klein,* 27 N. J. Eq. 550.

The Supreme Court of Colorado, in a case of a *passenger* who while crossing the railroad tracks, at a station, on his way to an eating house, was struck by a train, which he *could have seen had he looked before crossing* (citing 88 Pa. St., 78 N. Y., 84 N. Y., 27 N. J. Eq., 60 Md., and 105 Mass., *supra*) say:

> "By the foregoing and other well considered cases, it is settled, that a *passenger* on a railroad while passing from the cars to the depot is not required to exercise that degree of care in crossing a railroad track which is imposed upon other persons; and that he *has the right to assume that the company will discharge its duty in making the way safe;* and *relying upon this assumption, may neglect precautions* that are ordinarily imposed upon a *person not holding that relation.*"
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> *Atchison, &c., RR. Co.* vs. *Shean,* 18 Colo. 368.

There is no Evidence that Intestate had been Warned, or that He SAW or KNEW of His Peril.

There was no Warning.

Defendant's witness White was ticket agent at University station, and saw intestate when he arrived at said station, and again at the station, a short time before intestate was killed (Rec., pp. 9 and 10). White was presumably familiar with the movement of defendant's trains, and yet it *does not appear that he or anyone else gave intestate any warning of impending danger.*

Did Intestate SEE or KNOW of His Peril?

There is no evidence that he did. On the contrary, defendant's witnesses (five in number) testified that intestate crossed the tracks *obliquely, with his side and his back towards the express train*; which evidence *tends to show that intestate did not* see the approaching train.

Defendant's witnesses who saw intestate cross the tracks are Reynolds, Hughes, Lloyd, Stephens and Mrs. White, and their testimony on that point is as follows: Intestate had his *left side* towards the express (Rec., p. 14)—intestate went over the tracks *obliquely* with his *left side* towards the express (Rec., p. 16)—intestate approached with his *side* and *back* towards the west bound track (Rec., p. 18)—intestate's *side* was towards the express train (Rec., p. 19) and the witness Stephens who was the engineer *on the express* states that intestate walked *obliquely*,—sort of *sideways* with *more of his back* to him, *than his face* (Rec., p. 13).

It has been held that where a *passenger* at a railroad station, in crossing the tracks to take passage on a train, fails to look for danger, the *fact that such danger would have been apparent to him—had he looked—will not bar his recovery.*

Terry vs. *Jewett, Receiver, etc.* (*supra*) 338.
Brassell vs. *N. Y. C. & H. R. RR. Co.* (*supra*) 245.

Did Intestate Have Timely Warning of His Peril?

The Supreme Court of the United States, discussing the duty owed by carriers to travelers—*a class, by law, less favored than passengers*—say:

> "What is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning."

Continental Improvement Co. vs. *Stead*, 95 U. S. 164.

under the circumstances, in believing that *no train would, at that time, pass over the track which he was obliged to cross,* in *order to take one of the regular passenger trains of the road;* and, it might not be going too far to say, that *if he had looked* and *had observed* an *approaching train,* on *the easterly track,* he would have been *fully warranted in proceeding on his way across the track to the passenger train,* upon the reasonable supposition *that the approaching train would stop before it reached a point opposite the passenger station.*"

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Defendant's witnesses who saw intestate cross the tracks are Reynolds, Hughes, Lloyd, Stephens and Mrs. White, and their testimony on that point is as follows: Intestate had his *left side* towards the express (Rec., p. 14)—intestate went over the tracks *obliquely* with his *left side* towards the express (Rec., p. 16)—intestate approached with his *side* and *back* towards the west bound track (Rec., p. 18)—intestate's *side* was towards the express train (Rec., p. 19) and the witness Stephens who was the engineer *on the express* states that intestate walked *obliquely*,—sort of *sideways* with *more of his back* to him, *than his face* (Rec., p. 13).

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Continental Improvement Co. vs. *Stead*, 95 U. S. 164.

The alleged *blowing of the station whistle* by the express is DENIED by plaintiff's witnesses.

Plaintiff's witnesses prove that *the only intimation of the approach of the express* was the *blowing of the danger signal* when the express was about *forty or forty-five* feet from intestate.

Two of defendant's witnesses, Perry and Lloyd, respectively engineer and brakeman on the local passenger train, testify (*corroborating plaintiff's witnesses in that respect*) that the *only whistle they heard blown by the express* was the *danger whistle* (Rec., pp. 13, 18).

That being a fact—the express passed the station in *less than one second after the only warning of its approach*, and a period almost too brief for estimate was the only opportunity of escape from death afforded by defendant to one to whom, under the circumstances, defendant owed the duty of protection from any injury that could be avoided by human care and foresight.

The Court of Appeals of New York have declared that the approach of a train (at the rate of forty miles an hour) is—

> "*Stealthy* and *imperceptible*, and the sound is not readily distinguishable from others associated with *no danger*."
>
> *Ernst* vs. *Hudson River RR. Co.*, 35 N. Y. 35.

We have seen that six courts of last resort have held that *a passenger at a depot*, when crossing the railroad tracks to take a train standing at the station, is not required to look for danger from a train on the tracks which he is crossing; and his failure to look for such danger is not negligence, *even though he could have seen, and averted the danger, had he looked;* and, *unless* he *saw or knew* of impending peril, he is not negligent in crossing (105 Mass., 88 Pa. St., 78 N. Y., 84 N. Y., 60 Md., 72 Md., 27 N. J. Eq., 18 Colo., *supra*).

We have also seen, by the testimony of five of *defendant's*

witnesses, that intestate crossed the tracks at an angle which would have prevented his seeing the approaching express.

The Supreme Court of the United States have passed upon a case wherein the following facts similar to those in the case at bar appear.

Chicago, &c. Ry. Co. vs. *Lowell*, 151 U. S. 217.

That was a case of a *passenger.*

There was an *unobstructed view* of the tracks.

There was a rule prohibiting the running of trains past a station at which a train was standing.

There were two platforms at the station.

There was both *negative* and *positive* testimony in the case.

Thus far, there is similarity between that case and the case at bar.

The only dissimilarity is, inferentially, *in favor* of plaintiff's intestate; and is thus:

In that case, the plaintiff was *familiar* with the movement of defendant's trains. In the case at bar, there is *no evidence* tending to prove that plaintiff's intestate was aware of the time at which *the express was due at the station.*

In that case, defendant had placed a *sign* at the station, *warning* its patrons *of danger.*

In the case at bar, there was no evidence to prove that intestate, by sign, signal, or notice of any kind, was given warning of the danger to which he was subjected.

In disposing of the case last cited, the court say:

> "Proof that the plaintiff violated the regulations of the company, even without the excuse of a cogent necessity, will *not as matter of law*, debar him from a recovery."
>
> *Chicago, &c. Ry. Co.* vs. *Lowell, supra.*

IV.

We fully appreciate the force and wisdom of the rule that *directs* a verdict, when a verdict contrary to that directed should be set aside.

But this honorable court has not left it a question, when a verdict may be directed.

This eminent authority has held that:

> "In many cases, where the facts are *undisputed*, the effect of them is for the judgment of the court, and not for the decision of the jury. In some cases, too, the *necessary inference* from the proof is *so certain* that it may be ruled as a question of law."

And the court, in illustration, say:

> "If a *sane* man *voluntarily throws himself in contact with a passing engine*, there being *nothing to counteract the effect of this action*, it may be ruled, as a matter of law, that the injury to him resulted from his own fault, and that no action can be sustained by him, or his representatives."

The court, after a similar illustration, say:

> "But, these are *extreme* cases. It is in relation to *intermediate* cases that the opposite rule prevails. Upon the facts proven in *such cases*, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. It is assumed that twelve men know more of the common affairs of life than does one man—that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

The court (citing, with approval, *Detroit & W. RR. Co.* vs. *Van Steinberg*, 17 Mich. 99) continuing, say:

> "The cases are largely examined, and the rule laid down that when the facts *are disputed*, or when they are *not disputed*, but different minds might honestly draw different conclusions from them, *the case must be left to the jury* for their determination."

Railroad Co. vs. *Stout*, 17 Wall. 663–664.

To the same effect are the decisions in *Richmond & Danville RR. Co.* vs. *Powers*, 149 U. S. 43; *Gardner* vs. *Michigan Cen. RR.*, 150 U. S. 349.

One of the latest utterances of the Supreme Court upon the subject is thus:

> "It is only where the facts are such that *all reasonable men* must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."
>
> *Texas & Pacific Ry. Co.* vs. *Gentry*, 163 U. S. 353.

The evidence establishes that plaintiff's intestate *was a passenger.*

That intestate was not aware of his peril.

The law declares that intestate *was not required to look for danger.*

The law declares that although danger might have been apparent to intestate, had he looked; yet, *in failing to look*, he was *not guilty* of contributory negligence.

Is the case at bar the *extreme* case instanced by this honorable court, or, is it a case where *different* minds might *honestly* draw *different* conclusions?

Is it probable that twelve reasonable men would have been impelled by the facts in this case, to the unanimous conclusion that intestate on his way to take a train then and there waiting for him at the station, "voluntarily threw himself in contact with a passing engine?"

In what respect was intestate negligent?

Intestate was a passenger, holding a ticket issued by defendant. He was at the station where he had a right to be. He was there at the proper time to take his train. The train on which his ticket entitled him to be carried was standing at the station for the very purpose of receiving passengers.

Intestate, with the right to board the train—with the presence of the train indicating that the time to enforce that right had arrived—proceeds to exercise his rights as a passenger, and, in so doing, is slaughtered by the defendant whose first duty was to protect intestate from all peril against which human foresight could provide.

The court below, in affirming the judgment *directing the verdict*, held that all reasonable men must unanimously conclude, that intestate, while crossing defendant's tracks, in attempt to take a train standing at the station for his reception, was, in so doing, guilty of negligence in not apprehending danger which, in theory of law, could not then and there exist—and of which, as the facts in the case clearly indicate, intestate neither knew, nor was warned.

It is respectfully submitted that the error is palpable, and the judgment should be reversed.

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